No. 05-1603

Supreme Court, U.S.
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In The

Supreme Court of the United States

G.K. LTD. TRAVEL, W. H. GILLISON, KATHLEEN KUSUDO and RAMSAY SIGNS, INC.,

Petitioners,

v.

CITY OF LAKE OSWEGO and SANDY INGALLS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
REBUTTAL TO FACTUAL BASIS FOR OPPOSITION BRIEF	1
RESPONSE TO RESPONDENTS' FIRST AMENDMENT ARGUMENTS	6
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

American Amusement Machine Assoc. v. Kendrick, 244 F.3d 572 (7th Cir. 2001) 9

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 8, 9

Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982) 7

Hill v. Colorado, 530 U.S. 703 (2000) 10

Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987) 7, 8

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 8

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 6, 7, 8

Members of the City Council v. Taxpayer's for Vincent, 466 U.S. 789 (1984) 9

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 6, 8

New England Regional Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002) 9

Pearson v. Edgar, 153 F.3d 397 (7th Cir. 1998) 7

Sable Communications of Calif., Inc. v. F.C.C., 492 U.S. 115 (1989) 7

Thomas v. City of Chicago Park District, 534 U.S. 316 (2002) 2, 9

Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622 (1994) 7

U.S. v. Kokinda, 497 U.S. 720 (1990) 9, 10

TABLE OF AUTHORITIES – Continued

Page

RULES:

Supreme Court Rule 15(6) 1

APPENDICES

A Jurisdictional Comments of Municipal Court Judge, Garden Center Trial Transcript, Day 1 ..... A-1

B Direct Testimony of Darryl Eddy, Garden Center Trial Transcript, Day 2 ..... B-1

C Direct Testimony of Darryl Eddy, Garden Center Trial Transcript, Day 2 ..... C-1

D Direct Testimony of City Manager Doug Schmitz, Garden Center Trial Transcript, Day 2 ..... D-1

E Direct Testimony of Robert Galante, Garden Center Trial Transcript, Day 3 ..... E-1

F Direct Testimony of Robert Galante, Garden Center Trial Transcript, Day 3 ..... F-1

G ReDirect Testimony of Robert Galante, Garden Center Trial Transcript, Day 3 ..... G-1

H Direct Testimony of City Planner Hamid Pishvaie, Garden Center Trial Transcript, Day 3 ..... H-1

I Direct Testimony of Darryl Paulsen, Garden Center Trial Transcript, Day 3 ..... I-1

J Photograph of Sign Granted Icon Status J-1

INTRODUCTION

Respondents raise several new points in their Brief in Opposition to Petition for Writ of Certiorari. These issues are set out largely in their "Questions Presented." Respondents question what issues have been presented before the lower courts and are thus appropriately before this Court. Respondents also assert that Petitioners misstate the record of the case. Finally, Respondents raise new issues regarding the First Amendment issues presented. Pursuant to Supreme Court Rule 15(6) Petitioners file this reply.

REBUTTAL TO FACTUAL BASIS FOR OPPOSITION BRIEF

Respondents "Introduction" misrepresents the scope of issues petitioners identified and the nature of relief they seek. Petitioners contend the jury must resolve *all* conflicts in evidence supporting material facts, not just part of it. Respondents next claim that "[t]he preserved issues on appeal are narrower than stated in the Petition." All five issues are timely raised. Petitioners first challenged the new identity/viewpoint based exemption created in the Ninth Circuit opinion. They next contend the city failed to produce sufficient evidence to meet its burden of proving compliance with the Time, Place and Manner Test (TPM) or *Central Hudson* test. *See*, Petitioners' *Amended Reply*,[1] ER 259-267. Petitioners raised the absence of a federal jurisdiction to enter summary judgment for the city in their *Rule 60(b)(4) Motion to Vacate Opinion and Related Orders*, filed before judgment entered. ER 376-385. These issues are raised again in their appellate *Opening Brief* at pp. 15-43; and *Reply Brief* at pp. 2-7.

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[1] The *Amended Reply* granted by the district court substantially modified its original counterpart, and was filed prior to the entry of judgment. The *Opening Brief* and *Reply Brief* are Petitioners Court of Appeals Briefs.

Petitioners' next challenged the district court's decision to decrease existing *Freedman* protections now guaranteed in private forums found in its novel application of *Thomas v. City of Chicago Park District*, 534 U.S. 316 (2002) later ratified by the appeals court. *See, Opening Brief* at pp. 51-53, and Petition. The fourth issue petitioners raised is the city's unconstitutional application of its design review clause. *See, Second Amended Complaint* ER 9-10; *Amended Reply*, ER 264-266; *Opening Brief*, pp. 53-56; and *Reply Brief*, pp. 4-5. The final issue raised is whether the summary judgment is void where material conflicts in the evidence over material facts have yet to be presented to a jury. *See Rule 60(b)(4) Motion to Vacate Opinion and Order*, pp. 376-385; *Opening Brief*, pp. 56-59; and *Petition for Rehearing*.

Petitioners have always made an issue of respondents' burden of proving the city complied with the First Amendment prior to imposing restrictions on speech. None of the city's evidence shows: 1) that the City identified harm caused by the banned pole signs; or 2) that the city discussed the community's substantial or significant interests in addressing that harm; or 3) that the city attempted to determine whether new regulations restricting speech would materially further identifiable community interests; or 4) that the city carefully calculated and weighed alternative ways of addressing the harm and determined that imposing the new regulations left affected speakers with reasonable alternatives to continue communicating with their target audiences.

Respondents cite their *Motion for Summary Judgment* and the *Opposition Memorandum* to show petitioners abandoned claims. However, the *Plaintiffs' Amended Reply to Motions for Summary Judgment ("Amended Reply")* raises all of the issues respondents allege were abandoned. ER 247-290.

On the theory that the petitioners "distort the truth," respondents present a sanitized, after-the-fact rationalization of the city's legislative process, citing documents

offered as examples of unresolved material conflicts in the evidence in petitioners' appendix. Some portions of their record admit that officials purposely employ subjective standards to regulate signs in order to limit commercial expression to expression that "looks right" to city officials. What "looks right" varies from city official to city official and from day to day.[2] In light of testimonial admissions by officials against the city's interests at a municipal trial last May, combined with recent activity on the city's redevelopment plan for the Lake Grove commercial district, it seems that "what looks right" is whatever fits the city's redevelopment plans.[3]

The city's selective and scattered citations to the record fail to provide competent or sufficient evidence proving First Amendment compliance. The record is fraught with conflicting evidence and admissions against interest, including evidence showing the city is motivated by the unconstitutional purpose of suppressing speech through the use of unbridled discretion.[4] The limited scope of the documents it submitted provides no consideration of how, or if, the sign regulations would achieve their stated purposes, other than the unconstitutional purpose of censoring speech.[5]

Respondents' claims on pages 8 through 10 of their brief are materially contradicted by collateral evidence from the municipal court, developed after G.K. Travel

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[2] The City Council minutes show the degree of control exercised by the planning department. However, testimony given in the Garden Center Trial further shows a practice of unbridled discretion in the handling of sign permits. Testimony of D. Paulsen, at App. I-1-I-5.

[3] Testimony of R. Galante, at App. F-1; G-1-G-4.

[4] ER at 196.

[5] For instance, Hamid Pishvaie testified that the staff did not know how the sign dimensions allowed in the sign code were derived, and therefore would not know if the arbitrary reductions in sign height, size and changes in design that staff required furthered the purposes for the basic regulations or not, at App. H-8-H-11.

judgment entered. Effective May 22, 2004 all of the pole signs in the Lake Grove district were banned. The City soon passed a new law creating an exception allowing pole signs to be lowered and remain in substantially the same place with the same appearance if they were community "icons."[6] Lake Grove Garden Center, two blocks from G.K. Travel, also had a pole sign. Its owner, Mr. Darryl Eddy applied for a newly created "icon exemption" before removing it. It met the physical characteristics and longevity requirements for icon signs.[7] City Manager Schmitz had final say on the permit application.[8] He denied it concluding that his sign was not an "icon."[9]

Mr. Eddy kept the sign. The city issued twenty-one citations between August of 2004 and the conclusion of trial in May, 2005. Mr. Eddy and his business were convicted following a three day trial in April and June of 2005. He had no right to a jury. During trial the city redevelopment official Robert Galante testified as a hostile witness. His testimony establishes the city did not comply and cannot prove it complied with First Amendment standards restricting its police power to restrict speech.[10]

He could not recall the city identifying any harm associated with pole signs or other banned signs. He couldn't remember city officials deliberating over specific government interests that would be advanced by the language of the proposed regulation. He affirmed that the city's purposes in reenacting the code were to complete an

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[6] Testimony of D. Schmitz, at App. D-2-D-4.

[7] Testimony of D. Eddy, at App. C-1.

[8] Testimony of D. Schmitz, at App. D-7.

[9] Testimony of D. Schmitz, at App. D-5-D-8.

[10] Testimony of R. Galante, at App. E-2-E-3 (lack of evidence in the record showing harms in the community relating to pole signs and aesthetics); at App. E-3-E-4 (discussing aesthetic goal of seeing building architecture, but no basis for the City to believe that the restriction on pole signs would have any impact on achieving this goal).

annexation deal and change language to make the code appear to be facially content neutral, while applying it in the same fashion it had been applied before.[11]

Hamid Pishvaie, head administrator of the city's design review policies, testified about a memo he prepared in 2000. He identified pictures showing that the city continues to use the design review process to make sure proposed expression "looks right" by arbitrarily reducing the size, height, and altering the content of most proposed signs including replacement signs for the banned pole signs.[12] This is consonant with an appendix document reporting an official's comments about an applicant who felt he might as well just let the city design his sign in the first place. Petition, App. L-23, para. 2.

Other parts of the city court record show that *Freedman* prior restraint protections cannot be enforced in spirit, because the municipal judge decided that he has no jurisdiction to entertain First Amendment challenges in his court.[13] He made it clear he will resolve all sign code challenges under rational basis. *See* ISA Amicus Brief, App. 1, p. 3, para. 3.

The Garden Center record presents a very compelling post-judgment example of the city's admitted practice of unconstitutional censorship. A permit denial involving Garden Center's effort to retain its sign was based entirely upon the subjective whims of City Manager Schmitz. He took the witness stand and testified at length about the city's post-judgment icon status exemption. He admitted

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[11] Testimony of R. Galante, at App. G-2-G-3 (current code was based upon a 1985 ordinance, but that none of the evidence justifying that regulation are available).

[12] Testimony of H. Pishvaie, at App. H-2-H-6 (discussing using the design review clause to justify reducing the size and height of signs).

[13] Statements of Court, First Day of Trial, Reply, at App. A-1-A-4; Amicus Brief of International Sign Association, App. A-3.

that Mr. Eddy's sign fit the city's "objective" standards, that he was solely responsible for denying the exemption, and his decision was subjective.[14] Mr. Eddy testified that one of the two merchants approved for icon status said he did not have to prove his sign qualified.[15] Schmitz testified that one of the reasons Mr. Eddy's sign was not an icon was because it was a rectangular box mounted on poles.[16] That description fits one of the other two signs he did grant the exemption to.[17] The entire body of Schmitz' testimony about why he denied the permit is chilling and shows why *Freedman* protections must be restored.[18]

RESPONSE TO RESPONDENTS' FIRST AMENDMENT ARGUMENTS

Petitioners presented issues related to the regulation of speech by the city. The fact that the challenged regulations restrict sign height and size does not make them any less regulations of speech. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (explaining, "[sign] height restriction is an attempt to regulate directly the communicative impact of indoor advertising."). Petitioners challenge the manner in which the city regulates those characteristics. The primary question presented by this case is: how the First Amendment should apply to regulations of on-premise signs.[19]

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[14] Testimony of D. Schmitz, at App. D-3-D-6.

[15] Testimony of D. Eddy, at App. B-1, B-2.

[16] Testimony of D. Schmitz, at App. D-8, D-9.

[17] *See*, "LAKE OSWEGO COUNCIL SAYS ENFORCE SIGN CODE," The Oregonian, September 7, 2000, pg. D03, at App. J-1.

[18] Testimony of D. Schmitz, at App. D-1-D-16.

[19] Petitioners use the phrase "on-premise signs" to distinguish the facts in this case from *Metromedia v. City of San Diego*, where this Court addressed the law of billboards, or "off-premise" signs. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981).

Respondents argue there is no split of authority in the Ninth Circuit, or among the Circuits, on the questions presented. However, the cases they cite show a significant split exists. The opinion below demonstrates the disparity in First Amendment jurisprudence between sign cases and other general applications of TPM. In *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 639 (1994), this Court reviewed the physical characteristics of cable transmission, and concluded that, "whatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence." Likewise, general First Amendment principles should apply to on-premise signs.

When applying TPM to on-premise signs, some courts have expressed reservations about conducting a review stricter than that required by rational basis. In *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1110 (5th Cir. 1987), the Fifth Circuit was reluctant to inquire into the city's evidence supporting the determination that the sign ordinance would further aesthetics. That reluctance is inconsistent with *Dills v. City of Marietta*, 674 F.2d 1377, 1381 (11th Cir. 1982), *cert. denied*, 461 U.S. 905 (1983), where the Eleventh Circuit held a regulation of on-premise signs was unconstitutional where the City put forward no evidence supporting it. *See also*, *Pearson v. Edgar*, 153 F.3d 397, 403 (7th Cir. 1998) (*Central Hudson* test could not be satisfied without evidence). These cases followed the level of analysis applied in *Turner Broadcasting* and *Lorillard Tobacco*, where this Court explained that deference to legislative judgment did not mean blindly accepting the government's rationales. *See*, *Turner Broadcasting*, 512 U.S. at 664; *Lorillard Tobacco*, 533 U.S. at 566. As explained in *Sable Communications of Calif., Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989), "*Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.*" (emphasis added).

This Court's rulings on on-premise signs in the past have applied general principles of First Amendment jurisprudence.[20] Applying TPM requires a determination of whether the regulations directly and materially further the City's interest in aesthetics. However, reviewing regulations of speech to determine if aesthetics is furthered is nearly impossible. *See, Lindsay*, 821 F.2d at 1109. The primary concern is that there are no objective standards that can be used to review aesthetic based regulations. The nature of the subjectivity is so great that a City could argue that *any* regulation of signs – whether it be requiring monument signs, or requiring pink lettering – furthers its aesthetic interest. Accepting aesthetics as a substantial governmental interest to regulate speech is to reduce TPM or the *Central Hudson* Test to Rational Basis level of review. No more in-depth review is possible.

The respondents cite *Lorillard Tobacco* contending "Federal cases consistently hold that regulations of speech can be justified by history, consensus and simple common sense." Opp. Brief, p. 12. Whose common sense applies? The city claims banning pole signs furthers traffic safety. However, "common sense" suggests that the opposite would occur. Drivers looking for a destination that cannot find the sign quick enough to respond, are more likely to make dangerous, erratic, maneuvers than those that can easily find the sign. Respondents argue its "common sense" that drivers will be distracted by the sign and pay less attention to the roadway. The danger of relying on "common sense," is that there is no standard. "Common sense is sometimes another word for prejudice, and the common sense reaction to the . . . ordinance could be

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[20] *See, City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (time, place and manner test); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (applying *Central Hudson*); *Metromedia v. City of San Diego*, 453 U.S. 490 (applying Strict Scrutiny to content-based regulation); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (applying *Central Hudson* to on-premise tobacco advertisements).

overcome by social scientific evidence . . . " *American Amusement Machine Assoc. v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

Respondents also assert that there is no split in applications of *Thomas v. Chicago Park*, as it appears to be consistently applied by courts in omitting "public forum" from its holding. *Thomas*, however, clarified how *Freedman* protections applied within public forums. *See*, *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 21 (1st Cir. 2002). This Court has long recognized that the First Amendment applies differently based upon *how* speech is regulated as well as *where* the speech is regulated. In this case the speech regulated is on private property. Therefore it is inherently more protected than speech in non-public forums. *See*, *Members of the City Council v. Taxpayer's for Vincent*, 466 U.S. 789, 811 (1984). *See also*, *City of Ladue v. Gilleo*, 512 U.S. 43, 50 (1994) (explaining that *Taxpayers for Vincent* was primarily a Non-public forum case.). *See also*, *U.S. v. Kokinda*, 497 U.S. 720, 726-727 (1990) (discussing the tripartite framework for determining how government interests as property owner are balanced against speech rights of citizens).

Respondents argue that even if *Thomas* was limited to "public forums" that the *Freedman* protections would not apply in this case because the signs regulated are "visible from public ways, consequences measured in a public forum." Opp. Brief at 19. This argument is inconsistent with prior caselaw. The "reasonableness" standard was applied in *U.S. v. Kokinda*, to a sidewalk entirely on Federal land that solely served a Post Office. That sidewalk was deemed a "non-public forum," even though it was visible from a sidewalk along a highway – two traditional public forums.

Respondents' argument also misses the policy concerns underlying the forum analysis. The purpose of public forum analysis is to evaluate "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the

property for other purposes." *U.S. v. Kokinda*, 497 U.S. at 726. Respondents do not explain how treating private property like a public forum helps balance government power over government land with speech rights of citizens.

Respondents cite to *Hill v. Colorado*, 530 U.S. 703 (2000) to show its code is content-neutral. This Court explained, "it was the fact that the statute placed a prohibition on discussion of particular topics, while others were allowed, that was constitutionally repugnant." *Hill v. Colorado*, 530 U.S. at 722-723. The city's restriction on new signs granted a viewpoint based benefit to older businesses in town to the detriment of any new comers. Petitioners have consistently argued that those provisions should be required to satisfy strict scrutiny.

CONCLUSION

For the reasons stated above, and in Petitioners Petition and in the Amicus Brief, Petitioners request that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER and DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

April 18, 2005

* * *

[4] raised.

My ruling before, which I will again reiterate at this point in time, requires some historical discussion about how we got here.

Back in December of last year, we were set for trial on several of these matters: Lake Grove Garden Center Inc., and Mr. Darryl Eddy – or City of Lake Oswego v. Lake Grove Garden Center and Mr. Darryl Eddy.

At that time, the defendants submitted a demurrer raising constitutional issues, raising an as-applied constitutional defense. The demurrer was properly denied. Then I believed that and I still believe it. An as-applied constitutional defense for infringement upon rights of free speech and expression is a fact-based defense.

Demurrers are legally based. Demurrers are properly – on these types of constitutional issues – are properly raised when a facial challenge is made, either for vagueness or breadth. This is not a facial challenge to the statute. This is an as-applied.

But the demurrer – I then ruled that the demurrer, although denied, did, in fact, raise the defense at that point in time and additional time was taken for the parties to respond.

Based upon the defense, I have ruled that the City has an additional burden other than the elements of a [5] particular statute and that is to present evidence of the adoption of the Code by the City's executive branch. A substance of this particular evidence is up to the City, of course, but that element requires a showing that – and let me quote from a case I read over the weekend. You folks may have cited me to this, but I only got to it this weekend.

This is *City of Eugene v. Powlowski*. The cite is 116 Or App 186 and I quote: "The authority of a city to enact reasonable legislation to regulate conduct thought to be detrimental to the public interest is well recognized." And, of course, they make citation to that. "The City has broad constitutional latitude in fashioning a content and neutral law that regulates the manner of expression so long as the limitation is reasonable. But the limitation is unreasonable if it burdens expression that is otherwise constitutionally privileged."

In enacting a statute that infringes in any way upon constitutional provisions, protections, the City has to make a particular showing that they had a valid reason for doing it as this is a well justified public endeavor.

So what the City must show in this particular case to overcome this constitutional challenge is, in fact, that the City has taken this into account. This wasn't just, as an example, the mayor walking down the street bumping her head on a pole sign and deciding that she doesn't like pole [6] signs anymore. That, in fact, the benefit on the entire city has been taken into account.

Again, what evidence the City chooses to produce in that regard, it's up to the City. It's not my job to tell people what evidence to present on these cases.

But that's the limitation at that point in time. I don't believe it's my job, as a municipal court judge. I don't believe I have authority to go back, revisit the entire issue and substitute my particular belief regarding the benefit of the City versus what the City Council and staff may or may not have gone through at that point in time.

Additionally, and one thing I didn't point out is that, according to my review of the statutes applicable to this, there are several exceptions that might have verified the pole sign being in place historic.

There is the icon status. There is also the pole signs could be allowed if there was a – it was necessary to provide vision clearance at driveways or intersections when there's no alternatives.

I would expect the City to simply present the fact that that is – that a person has the ability to get that particular type of a variance and it hasn't been achieved in this particular case.

Whether or not that was because the variance was [7] not sought or whether the variance was sought and was denied, I would expect to see that. Again, if it's one of those

where someone has – I'm not going to be substituting my particular beliefs for what would be a variance officer's decision.

* * *

APPENDIX B

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER and DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

May 26, 2005

* * *

[95] Q Prior to your application of the icon status – for the icon status, did you talk to other business owners about the icon status application process?

A I talked to Mike Buck, owner of Gubanc's Bar across the street. And my understanding is that –

MR. SERCOMBE: Objection on hearsay grounds.

THE COURT: Yeah.

If you're going to talk about what he said, then that would be hearsay.

THE WITNESS: Okay.

MR. BRAGG: Your Honor.

THE COURT: Go ahead.

MR. BRAGG: We move to admit the testimony on – the effect on – the effect the testimony had on Mr. Eddy, not necessarily the truth of those out-of-court statements.

THE COURT: Okay.

Let's hear what he has to say and we'll decide, then; okay?

[96] MR. BRAGG: Thank you.

THE COURT: Go ahead.

BY MR. BRAGG: (Continuing)

Q What was the substance of your conversation with –

A Okay. My comments that I wrote down at the time was – and this was on August 12, 2004. I told him that my sign application has been rejected based upon not having provided evidence of icon status.

He stated that his application had been approved when asked and he said that he had not provided any evidence of icon status.

Q Have you talked to any other business owners who applied for icon status?

* * *

APPENDIX C

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER And DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

[100] Q Mr. Eddy, please continue. I believe you were discussing your comments to Doug Schmitz following review of a newspaper article –

A Sure.

Q – on the icon status.

A Okay. The notes I wrote down at the time was that I told Mr. Schmitz that, from the criteria of the amended sign code, my sign should qualify and apply under the amended code.

To my surprise, Mr. Schmitz emphatically returned with a statement that I would not get it.

Q Did he give any reasons at that time as to why you would not get it?

A Well, I commented that, then, from my understanding of the *Review* article and so forth that the Code was changed strictly for the benefit of the Giant Burger alone. He countered that several other businesses would qualify for the exception. I asked who those [101] businesses might be. And he said that they would have to wait until they actually applied.

Q To your knowledge, have any other businesses –

A I'm not aware of any other businesses except maybe the Gubanc's Restaurant.

Q And, when you were denied the icon status, you were of the impression that that was because in someway your sign was not viewed as an icon; is that correct? Did the City tell you that your sign was not an icon and that's why you were denied the icon status?

A The City denied the icon status because I was not an icon.

* * *

APPENDIX D

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER and DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

[167] MR. WINSTON: Okay, Your Honor.

I guess my biggest problem is this Code was passed with a discussion of objective and subjective standards and I can't tell for sure what they are and that's why I have this witness – that's one of the main reasons I have this witness up here.

And, Your Honor, part of it is tied to the fact that he has complete discretion in certain areas. And I'm going to move on to Mr. Eddy's case and the icon status and we're going to move on to the icon status statute.

THE COURT: Okay.

MR. WINSTON: Your Honor, I believe that's found in Exhibit 38, page 23.

And I'm going to approach the witness.

THE COURT: 38 (inaudible).

MR. BRAGG: Yes. The City's exhibit.

MR. WINSTON: I'm sorry, Your Honor.

MR. BRAGG: 38, page 23. 47.410 subsection 1E, I believe.

MR. WINSTON: Yes, sir.

THE COURT: Okay.

I'm sorry.

Would you gentlemen repeat that, please?

MR. BRAGG: Sure.

4710.410.1E. Exceptions in GC Zone. It's on page [168] 23 of Exhibit 38.

THE COURT: Thank you.

MR. BRAGG: Sure.

BY MR. WINSTON: (Continuing)

Q Mr. Schmitz, I'm showing you the City's exhibit notebook. I'm showing you a page labeled Exhibit 38, page 23 of 30; okay? I'd like to direct your attention to Section 4710.410. Could you describe what that is?

A The heading for the section is permanent signage requiring permit allowed in commercial zones. CG NC OC-R2.5 OC-NC and R25, essentially.

Q Okay. Now, I'd like to direct – now, have you read this statute before?

A Yes.

Q Would agree that this statute is known as the icon statute? Would that be a fair characterization?

MR. SERCOMBE: Object on the question.

It is an ordinance. It's not a statute.

MR. WINSTON: Ordinance.

THE COURT: Thank you.

Go ahead.

THE WITNESS: Section E under heading I – Free Standing Signs – references icon signage.

BY MR. WINSTON: (Continuing)

Q Okay. And I direct your attention to subparagraph [169] E; okay?

A Yes, sir.

Q And what's the heading on that?

A Exceptions in GC zone.

Q Is that the zone where Mr. Eddy's sign is located?

A Yes, sir.

Q Okay. And could you read the text of E? It's relatively brief.

A The City Manager may grant exceptions to the size and height limitations for monument signs under subsections 1A and 1C of this section, as well as exceptions to design standards of LOC 47.06.200(4) as necessary to allow an existing pole sign in the GC zone that was nonconforming prior to May 21, 2004, to be converted to a

monument sign on the same premises, provided that – would you like me to read the subheadings under that?

Q Yes. The first one.

A 1. The existing sign is widely recognized in the community as a unique symbolic icon identified with a particular era.

2. The sign has been continuously displayed unchanged for at least 20 years prior to the conversion.

3. The area of the sign does not exceed 50 square feet.

4. The conversion results in no change to the [170] face of the sign.

5. The height of the monument sign, including the base, does not exceed 10 feet.

Following conversion to a monument sign any exceptions allowed under this subsection 1E shall apply until there is an alteration or change of the sign, including any change of copy or until any change of use on the premises, at which time the sign shall be made to comply with all requirements of this chapter.

Q Okay. Now, you heard Mr. Eddy's testimony earlier; correct?

A Yes, sir.

Q And he applied for icon status; is that correct?

A Yes, sir.

Q And you made the decision about that; is that correct?

A Yes, sir.

Q And the decision –

MR. SERCOMBE: Your Honor, I think that Mr. Winston should question the witness from here and not standing right next to him.

THE COURT: Do you plan on referencing the Code any further?

MR. WINSTON: No. I was through.

THE COURT: Oh, okay.

[171] Proceed.

If you wouldn't mind.

Thank you.

MR. WINSTON: Well, I may need to, Your Honor, because I'm going to ask him a question (inaudible).

BY MR. WINSTON: (Continuing)

Q Okay. What was the reason that you denied icon status?

A E1. The existing sign is widely recognized in the community as a unique symbolic icon identified with a particular era.

Q Okay, sir. And I would like you to take a look at that legislation and tell me if there are any standards published for determining which signs are icons and which ones are not.

A I think that the statute speaks for itself in that there isn't; right?

Q You would agree there are no standards for determining what signs have enough status and what ones –

MR. SERCOMBE: Object.

The Ordinance speaks for itself. It sets out the standards for the determination.

MR. WINSTON: Your Honor, it sets out standards that describe the physical characteristics of the sign, how long it's been there, etc.

[172] But I'm focused on the icon part of it. And it has the City Manager making a decision as to which signs have icon status, which ones do not.

I'm trying to establish there are no standards for determining which ones are icons and which are not. It's completely within the discretion of the City Manager.

THE COURT: Mr. Winston –

SERCOMBE: And if the question is –

THE COURT: – and I don't mean any disrespect, but we can all read.

MR. WINSTON: Okay.

THE COURT: It's not there.

MR. WINSTON: Okay.

THE COURT: We all can read it.

MR. WINSTON: I just wanted to ask him if he (inaudible) was the case.

MR. SERCOMBE: Well, if you're asking him whether or not there are standards anywhere that he uses to determine whether or not something is identified with a particular area or iconic, that's a different question. But you asked him whether or not there were standards in this ordinance.

THE COURT: Gentlemen, my understanding of the question was as it related to the statute.

I assume Mr. Winston may follow up with standards [173] that are not listed in the statute.

MR. WINSTON: Yes, Your Honor.

THE COURT: All right.

Go ahead.

MR. WINSTON: Okay.

BY MR. WINSTON: (Continuing)

Q So you would agree that there are no standards listed in the statute for the icon status part?

THE COURT: Ordinance.

MR. WINSTON: In the Ordinance.

THE WITNESS: For icon.

BY MR. WINSTON: (Continuing)

Q And you're the only one that's empowered by that ordinance to make that determination?

A Correct to your last question.

Q Okay. Now, do you – are there standards that aren't in the statute that you rely on?

A Well –

MR. SERCOMBE: For determining whether –

MR. WINSTON: To determine whether or not –

MR. SERCOMBE: – or not something is a unique symbolic icon –

MR. WINSTON: Yes.

MR. SERCOMBE: – identified with a particular area?

[174] THE COURT: Mr. Sercombe, please.

Go ahead.

THE WITNESS: I don't necessarily agree with your first comment that there are no standards.

I think item 1 under E provides some general standards for what is an icon sign: Widely recognized in the community, a unique symbolic icon of a particular era.

Q Okay. So those are the standards you say you apply.

A Yes, sir.

Q In Mr. Eddy's case.

A Yes, sir.

Q How did you determine that it was not widely recognized (inaudible)? Or which part did you determine disqualified him icon status?

A It's a two cabinet – sign cabinets on a pole. There's nothing distinctive or unusual about that.

Q Oh. So may I infer that Lake Grove is filled with two signs on a pole all up and down the street?

THE COURT: That's argumentative, sir.

Please rephrase your question.

BY MR. WINSTON: (Continuing)

Q What is the basis of that conclusion?

MR. SERCOMBE: And would you kindly address the witness.

[175] MR. WINSTON: I will.

MR. SERCOMBE: Your Honor, I object to him –

MR. WINSTON: I think I'm done with this –

MR. SERCOMBE: – standing next to the witness.

MR. WINSTON: – now, Your Honor.

BY MR. WINSTON: (Continuing)

Q Okay. So let me – let me try to abbreviate this, if I can. And maybe you can just confirm my understanding of your testimony. And maybe it's easier – yeah.

Are there any standards that don't appear in the Code that you relied on to decide to deny Mr. Eddy permission for icon status?

A No.

Q No. How did you make a determination that the sign is not widely recognized in the community as an icon?

A There are signs just as there are buildings that are discussed, commented upon in the community. And that has never been one of them.

Q Do you have a record of what's been commented on by the community?

A No.

Q Do you believe a thousand people signing a petition to allow Darryl Eddy to keep his sign has any influence over your decision that it's not an icon – that it's relevant to your decision that it's not an icon?

[176] MR. SERCOMBE: I object to the form of question.

If he's asking was that considered as part of the decision on the icon application, he should. But I think he's asking if it's relevant at the same time.

THE COURT: It sounds like a two-part question.

Why don't you go ahead with the first part whether or not it was considered.

BY MR. WINSTON: (Continuing)

Q How did you determine whether or not it was considered an icon?

A It has not been in conversations I've had with members in the community, has not been listed, identified, the subject of commentary about it being unique, distinctive, characteristic of a particular era.

Q How many members of the community?

A I couldn't say. I –

Q A thousand?

A I couldn't say.

THE COURT: Mr. Winston, would you please allow him to answer the question.

BY MR. WINSTON: (Continuing)

Q You couldn't say.

A No.

Q Do you have any general idea?

A Over 100.

[177] Q When did you start contacting them?

A No. It's not you go out and ask the question. It's commentary when the sign debate is going – this sign debate has been going on. People make comments about signs.

Q What people?

A That's a sub – members of the community when I go to social events. I go to meetings. And this pole sign issue has been a subject of considerable discussion in the community and people make comments about signs.

Q So this is basically your circle – your impression of what your circle of friends say –

A I didn't say –

Q – and acquaintances say.

A – circle of friends. I said I go to meetings. I go to events and people comment about –

Q Is there anything –

A – the issue.

Q – scientific – I'm sorry. Okay.

Is there anything scientific about the way you decide who to ask about it?

A No.

Q Okay. So it's pretty subjective, isn't it?

A Well, subjective, if you disregard item I under section E of the Code.

Q Well, doesn't it allow you to deny icon status to [178] anybody who you go out in the community and talk to other people about if they don't think their sign is an icon? Isn't that the standard?

THE COURT: I didn't –

MR. SERCOMBE: That mischaracterized –

THE COURT: – the question.

MR. SERCOMBE: – the testimony.

THE COURT: Would you rephrase that question again, please.

MR. WINSTON: I'm trying to establish what standard he's applying.

THE COURT: I know what you're –

MR. WINSTON: Okay.

THE COURT: – trying to do.

I didn't understand that question.

MR. WINSTON: I'm sorry, Your Honor.

I'm going to move to a different question.

THE COURT: Okay.

BY MR. WINSTON: (Continuing)

Q How many applications have been made for icon status?

A Well, between two and four. And I say two to four because there were – or three. I'm sorry, three to five because there were three that I know of that were received. There were two that made inquiries and I'm not sure if they [179] followed up with the filing of an application.

Q Okay. So you're only aware of two of them applying?

A Three.

Q Three. Who were the three?

A The Giant Burger.

Q Uh-huh.

A Gubanc's.

Q Uh-huh.

A Lake Grove Garden Center.

Q Okay. Who did you consult – did Gubanc's – was Gubanc's granted icon status?

A Yes.

Q Okay. And who did you consult to determine whether Gubanc's sign was an icon?

MR. SERCOMBE: I know I have an objection to this line of questioning, but I think we're really going far afield once we move past Lake Grove Garden Center's application for the status and start talking about the Manager's determination in other applications for icon status. It's very far removed from the constitutionality of this particular ordinance that we're seeking to enforce.

Now, I understand that we're going down that in terms of talking about icon status and this particular defendant's application for it, but now we're talking about [180] other applications.

MR. WINSTON: Your Honor –

THE COURT: Objection is overruled.

MR. WINSTON: Okay.

THE WITNESS: Would you repeat the question?

THE COURT: Would you repeat the question, please?

MR. WINSTON: Okay.

BY MR. WINSTON: (Continuing)

Q Who did you consult when you made the decision to grant icon status to Gubanc's?

A I'm not sure I consulted anyone. It's –

Q How did you determine it was an icon?

A Because, when you go in a community to events and activities and meetings and people comment about issues that are pertinent to the City at that particular time – and in this particular time, it was the pole sign ordinance – a person said – there seemed to be a consensus that the Gubanc's sign was distinctive because it was circular, that it had been a beacon for that business for a period of time beyond the 20 years specified in the Ordinance, and it had characteristics that were unique and recognized within the community.

Q Who said that?

A Persons of the community at meetings, events.

Q Oh, you don't remember the specific individual or individuals?

A There were many individuals who made comments [181] about it.

Q And these were spontaneous comments?

A These were comments which people made at meetings, events, activities –

Q Okay.

A – that I attended during the time that the pole sign ordinance –

Q Are you a resident of the City of Lake Oswego?

A Yes, sir.

Q Okay. What's the population?

A 36,000 –

Q 36,000.

A – plus or minus 15.

Q So you got input in the Garden Center case from a hundred people out of 36,000?

A I didn't say a hundred. I said over a hundred. And I couldn't tell you exactly how many.

Q Why does that represent that large of a community's belief of whether it's an icon or not?

A Because that's the portion of the community I came in contact with on this particular matter –

Q Oh, I see.

A – that made comment about pole signs.

[182] Q Okay. And I guess the rest of the folks out there really don't matter.

* * *

APPENDIX E

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO

COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER And DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

May 31, 2005

* * *

[12] A No.

Q Are there any documents – were there any documents produced by the City with regards to problems with aesthetics in pole signs, to the best of your recollection?

MR. SERCOMBE: Excuse me, are you talking about – are you talking about the documents that are – have been admitted into evidence or documents produced?

MR. BRAGG: I'm asking generally were there any documents.

MR. SERCOMBE: Produced to whom?

MR. BRAGG: Produced by the City. Created by the City.

MR. SERCOMBE: Oh.

MR. WINSTON: For the City's use.

THE COURT: Is that created by the staff of the City? Is that what you mean?

MR. BRAGG: Yes.

THE COURT: Okay.

Go ahead.

BY MR. BRAGG: (Continuing)

Q To the best of your recollection.

A Well, my recollection extends to the record in front of us at this point. So I don't believe there were documents outside of what we're looking at.

Q Okay. And to the extent you were able to review [13] the documents in front of you – I know there wasn't a lot of time and there's a lot of pages – is there anything in the plaintiff's exhibits that deal with aesthetics and show that there's a problem with aesthetics and pole signs?

MR. SERCOMBE: Objection.

The documents speak for themselves.

THE COURT: I'll sustain the objection.

I think it's pretty clear to all of us the answer is no for those of us that have reviewed it.

MR. BRAGG: Okay.

BY MR. BRAGG: (Continuing)

Q Turning to visibility, to the best of your recollection, what was the problem – what was the concern with visibility in pole signs? Who were they – who were you concerned wasn't being able – wasn't able to see the signs? Was the City concerned?

A Primarily motorists.

Q Okay.

THE COURT: I'm sorry, motor?

THE WITNESS: Motorists.

THE COURT: Motorists. Thank you. Okay.

BY MR. BRAGG: (Continuing)

Q What research did the City look at with regards to visibility and pole signs at the time?

A I'm not sure what you mean by "research."

* * *

[25] Q So I just want to make sure that I understand that your testimony is that a pole sign, which stands 18 feet tall on a single pole, blocks architect – the architectural style of a building more than a monument sign, which stands 8 feet tall and has a width varying from either a single pole, multiple poles or the width of the sign, a base, that goes all the way up 8 feet tall in front of the building. Is that what the City determined?

A Well, I – first of all, no. I think you're using width as I would use depth. And whether it has one pole or [26] two poles, I didn't distinguish.

When you were asking me about width earlier, I was talking about the width as it typically is perpendicular to the street. The width of the base, not the width of the sign.

Q Monument signs, you're saying, are usually perpendicular to the roadway, not parallel to it?

A They are most often, but not always perpendicular to a –

Q And the City determined that there was more of the building visible behind either the perpendicular monument sign, which is more of a block, than the taller pole sign?

A That was my recollection.

THE COURT: I'm sorry to interrupt, again.

* * *

APPENDIX F

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO

COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER And DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

[30] Q Okay. So, with regards to all signs generally, then, were there other aesthetic concerns that the city staff had?

A There's a compatibility review section of the Sign Code, which outlines the aesthetic issues and concerns that should be addressed for a sign.

Q Did the city staff come up with an objective formula for applying that design review clause?

A There is no objective review possible for a subjective standard.

* * *

APPENDIX G

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO

COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER And DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

[53] Q Was it, as reflected in City Council decisions over the past 12 years – has there been a desire by the Council to affect the character of the Lake Grove area?

A Yes.

Q And what's been that change or desire?

A Well, some number of years ago – and I'm not very specific on this because I don't manage the planning – haven't managed the planning department during that time so I haven't been specifically a part of it – but they did pursue Main Street program, which would create a more village character along Boones Ferry Road. And they did also fairly recently, even within the last few years, begin a study to look at creating a more village downtown character for the Lake Grove area.

Q And part of the desire to create a village character, does that involve having the signs at a lower level so that they're more visible to pedestrians and less oriented to motorists?

A That can often be one of the tools that's used to create that character.

Q Beyond the specific findings that were adopted by [54] the City Council, as reflected in Exhibit 11, do you have personal knowledge of the reasons why any individual councilor voted to adopt Ordinance 2085?

A Not at this point. I may have at some point in my life, but I don't recall.

MR. SERCOMBE: No further questions.

THE COURT: Redirect.

MR. BRAGG: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. BRAGG:

Q You were just asked several questions about the Sign Code enacted in 1985. Do you recall that testimony?

A Yes.

Q What were the harms present in the community relating to signs in 1985?

A I don't recall.

Q Do you recall if the City had any evidence in 1985 relating to harms present in the community – or relating to signs?

A No. I don't recall the evidence that we reviewed.

Q Has any of that evidence – would any of that evidence appear to be included in the exhibits – Plaintiff's Exhibits 1 through 38 in front of you, to the best of your knowledge?

MR. SERCOMBE: Object.

[55] The documents speak for themselves.

THE COURT: They do. I don't believe there's any there. I don't think any of us conclude that there is.

MR. BRAGG: Okay.

MR. SERCOMBE: Well, actually, Your Honor, there are references to the 1985 Code in several of the documents.

THE COURT: Yeah. I know the references are there, but the specific basis upon which the 1985 was adopted and the evidence they had I don't believe is there. I think we've all reviewed it and concluded that.

MR. BRAGG: Okay.

BY MR. BRAGG: (Continuing)

Q Exhibit 1 of Plaintiff's Exhibit 1, page 1, Section 4701, that appears to be the purposes section of the 1985 Sign Ordinance; is that correct?

A That's correct.

Q Do you have any reason to believe that there are purposes outside of those contained in Section 4701 and the adoption of that ordinance? Were there any other reasons for adopting Ordinance 1921 other than ones

stated in Section 47.010, to the best of your knowledge and recollection?

A (Inaudible.)

* * *

APPENDIX H

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO
COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER And DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

[84] BY MR. BRAGG: (Continuing)

Q I'd like to go back to the issue of the interpretation of the design review clause and at this time direct the witness's attention to Exhibit 20. And page 3 of Exhibit 20. Are you familiar with this document?

A Minutes of Council Meeting from February 1st of 2000?

Q Exhibit 20.

THE COURT: It's Exhibit 20, sir.

THE WITNESS: Exhibit 20. Yes.

MR. WINSTON: He's on the first page, Your Honor. I think he said 3.

THE COURT: Oh, I'm sorry.

MR. BRAGG: Yeah.

THE WITNESS: Okay.

Am I familiar with this document?

MR. BRAGG: Yes.

THE WITNESS: It's the Minutes of the Council meeting.

MR. BRAGG: I think we're looking at different documents.

THE WITNESS: Are we?

THE COURT: Can I see –

THE WITNESS: You said Exhibit 20?

THE COURT: I think you need to go back further.

[85] THE WITNESS: Exhibit 20.

THE COURT: You're looking at page 1?

MR. BRAGG: I'm looking at page 3, Your Honor.

THE COURT: Page 3.

You're looking at page 35.

THE WITNESS: Page – oh, there are two page numbers here, I'm sorry.

THE COURT: I thought we were on wrong – different pages here.

THE WITNESS: These are attachments, I suppose, to Exhibit 20. Sorry.

THE COURT: It's all right.

THE WITNESS: Okay.

THE COURT: It should be a planning department memorandum.

THE WITNESS: Yes. I'm sorry. Yes.

BY MR. BRAGG: (Continuing)

Q Are you familiar with that document?

A It's a memo written by me three pages long. Yes.

Q Okay. Do you recall the general subject matter of this memo?

A If I recall, this memo was prepared in response to the Council's direction as to whether there was any need to rewrite the Code and, particularly, I think it related to compatibility issue and a directive stamp to go to the [86] Planning Commission and the Development Review Commission and get their input as to whether there was a need, again, to rewrite the Code.

Q Do you recall the City Council discussion leading up to that request?

A I think – actually, I don't. I have just vague memory as to what context it was brought up in.

Q Do you recall what your conclusion was?

MR. SERCOMBE: Object.

What his conclusion was about something he doesn't remember?

THE COURT: I'm sorry, what's the point?

BY MR. BRAGG: (Continuing)

Q Do you recall what the conclusion of the memorandum that you wrote on November 3, 1999, discussing the development review criteria that we were just talking about?

THE COURT: Doesn't the document speak for itself, sir?

I would prefer to look at his words at the time he wrote the document as opposed to what he remembers now six years later.

MR. BRAGG: Okay.

BY MR. BRAGG: (Continuing)

Q Turning to page 7 –

[87] A Of the same exhibit?

Q Of the same exhibit.

This was part of the attachment to your memorandum; is that correct?

A I take your word for it. I can't remember.

Q Okay. Can you describe what we're looking at on page 7?

A We're looking at a picture of the monument sign for Palisades Market, which is located on McVey Avenue.

Q Beneath the picture you've got a legend indicating a proposed versus approved.

A Uh-huh.

Q Could you explain what the difference is there?

A What the difference is?

Q Yes. What's the difference between the proposed and the approved?

MR. SERCOMBE: Objection.

He's already testified he doesn't recall this exhibit.

THE COURT: I think he can testify to what the legend would have been based upon the wording of it.

I'll overrule the objection.

THE WITNESS: Typically, the proposed imply what the original application was for and approved means what was ultimately approved.

[88] BY MR. BRAGG: (Continuing)

Q So, in this case, someone proposed a 32-square-foot sign and they were approved a sign that was 30.66 square feet?

A Correct.

Q And I understand that this was probably some time ago. Would the basis of this approval – this difference be related to the design review criteria, to the best of your recollection?

MR. SERCOMBE: Object.

Lack of foundation.

THE COURT: Well, if he remembers what the difference between the two was, as it applies to this particular sign, I'll allow him to answer.

THE WITNESS: I believe this project was approved. I don't believe I know this project was approved by DRC. That's short for Development Review Commission.

What I don't recall was the sign being reviewed as part of that process. It might have been. I do not recall that.

So this goes to a design compatibility issue. This was a major project in that neighborhood, the McVey neighborhood. It took a couple of years to actually go through the process.

So, as part of the design compatibility and the [89] sensitivity to the overall design of the project, most likely the size was reduced to the extent that you see in this exhibit.

Q Okay. Page 9 of Exhibit 20. Do you recognize this?

A I think this is a sign for a gas station on State Street.

Q Okay. And here they proposed 32 square feet and were approved 24 square feet; is that correct?

MR. SERCOMBE: Your Honor, again, I do have a continuing objection, not only to issues about compatibility review, but specific permits that were issued or not issued to the people. That was part of our motion in limine. And I do want to state a continuing objection to that.

THE COURT: I understand.

MR. SERCOMBE: The results of any particular other sign permit is completely irrelevant.

THE COURT: Mr. Bragg, I need to ask before I rule on whether or not to allow this testimony: Are we going – what is the purpose of going with each individual sign? Tell me your purpose.

MR. BRAGG: The purpose is to show that the City in the enforcement of its sign ordinance arbitrarily limits the size, height, dimensions of the sign. There's a lack of consistent standards from one to another and that that is [90] the case, generally, and then, specifically, with regards to our client, Garden Center.

THE COURT: How many of these do you intend to be going through?

MR. BRAGG: Your Honor, there are a number of pictures here, but I don't need to go through every one. I was going to just talk about a couple of them just to show that there was, in fact, that difference.

If the Court wants to take judicial notice that the pictures say what they say, we can move on to other questions.

THE COURT: I'd like you to be more general.

You do have a continuing objection, as it applies to this.

I'll give you a little bit of latitude, but I'd like to talk about generally the differences, as opposed to going to individuals because we really don't know the details of what ultimately got these people from their proposal to the

actual Sign Code, whether it's just something somebody decided by spinning a wheel or if it was a really thought-out process between the owners of these signs and the city staff.

MR. BRAGG: Okay.

THE COURT: And I don't want to – we could go forever in terms of coming up with that process.

[91] And perhaps I might suggest you could ask: Is this just something that you guys come up with randomly or what is gone through? And I think part of that's already been answered.

Go ahead.

BY MR. BRAGG: (Continuing)

Q Is the dimensions, the set height and the – that was approved and the approved square footage for Exhibit 20, page 9 – are those dimensions that the city staff came about randomly or was there some particular standards that were applied – or in general that would be applied?

A We don't come up with just random numbers. I mean, it's decided – I have 23 years of experience in planning and particularly administering the Sign Code over 18 years of experience. So nothing happens randomly. So it comes with other experience dealing with hundreds, if not thousands, of signs and so forth.

So, in terms of this particular one, I don't really recall the background, but I do remember meeting the property owner on the site myself two or three different times. And the sign was discussed. We looked at the way it was being

proposed, again, the relationship to its location to the sidewalks, relationship to the light poles, to the building, to the canopy over the pump station and a whole slew of issues. And, finally, I think, was kind of [92] consensus that that size was appropriate size for that location.

Q Did you give any consideration of visibility of the sign?

A Visibility of the sign. That is part of the process. Yes.

Q And a smaller sign is more visible than the proposed sign?

A That's another question. The question is: Is it visible and has visibility?

Q What's your background in visibility?

A It's common sense and experience that you employ in reviewing designs.

Q Have you reviewed any research on sign size with regards to traffic safety and visibility issues?

A Occasionally. Yes.

Q Which documents have you reviewed?

A I don't recall the name of it.

Q Are you aware of any documents in research on visibility that would have been reviewed by the City in drafting its ordinances?

A Yeah. (Inaudible.)

MR. SERCOMBE: Excuse me, is the question about any ordinance of the City? And, if so, then that's –

THE COURT: I think we're back to –

[93] MR. SERCOMBE: – irrelevant.

THE COURT: – '93, if I'm not mistaken; is that correct?

MR. SERCOMBE: Well, this particular ordinance.

MR. BRAGG: I was referring to generally the ordinances that would have been – that we've talked about regarding signs. If that's too general, then I can back up and ask the specific question for each ordinance, if you'd prefer.

MR. SERCOMBE: You just referred to ordinances and I didn't know if you were talking about the 1985 and 1994. He's testified he wasn't involved in those.

THE COURT: Well, the 2000 and the 2003, I think, he's testified did not involve the analysis process that you're getting at, if I'm not mistaken; okay? In fact, I've got a little note to myself to that effect.

So I think we're talking about back in '93-'94; is that your –

MR. BRAGG: That would be the –

THE COURT: Okay.

THE WITNESS: I don't recall. I wasn't involved, Your Honor. I don't recall.

THE COURT: Okay.

THE WITNESS: I don't know.

[94] BY MR. BRAGG: (Continuing)

Q So you don't know if research had been done to determine that the dimensions listed in the Sign Code were generally necessary for visibility?

MR. SERCOMBE: Asked and answered.

THE COURT: It's sustained.

BY MR. BRAGG: (Continuing)

Q Do you know where the dimensions that are listed in the sign ordinances – how those dimensions were (inaudible)?

A No, I don't.

Q So, in reducing the dimensions for a proposed sign, you don't know whether or not you're furthering the purpose for that particular dimension that was in the Code or not?

* * *

APPENDIX I

IN THE MUNICIPAL COURT
OF THE CITY OF LAKE OSWEGO

COUNTY OF CLACKAMAS, STATE OF OREGON

CITY OF LAKE OSWEGO, Plaintiff, v. LAKE GROVE GARDEN CENTER and DARRYL G. EDDY, Defendants.	)	No. 04-CI-61302, et cetera

TRANSCRIPT OF PROCEEDINGS

* * *

[138] THE WITNESS: The application process depends on two different factors. One, if you're just changing the face on a sign, if you're changing the copy on the sign, you have to get a permit to change the copy. And, if that sign is nonconforming and you change the copy on it, then you have to bring it into conformance.

If you're seeking to put in a new sign, there's a another application for that. And you would make up a design, meet with your customer, get it approved, and submit that design with the application to the city. And then they would let you know whether or not they would grant you the square footage and height or colors that you were seeking to obtain for that customer.

Q In your application process, is it typical for you to go in there and apply for a sign of whatever dimensions and have that approved?

A In most municipalities they have a code regulation that outlines the square footage and height requirements. You make an application, based on those requirements, and submit it.

In Lake Oswego, it doesn't work that way.

[139] Q How does it work in Lake Oswego?

A You submit it and then they tell you what you can have.

Q And that goes to just the size limitations?

A Size and height.

Q Size and height. Were you here – were you present for Mr. Pishvaie's testimony?

A Yes.

Q And do you recall his comments that sign companies were getting better at having the earlier application comply with the Sign Code?

A Yes.

Q Do you agree with that statement?

A No, sir.

Q What's your take on –

A A reasonable person can't make an application for a sign permit in the city of Lake Oswego and get it approved.

Q Why not?

A Because there's no way to ascertain whether your design is going to meet the square footage or height that staff thinks you ought to have.

Q So, when you apply for a permit, what usually happens?

A They will get back to you and tell you that the [140] sign is not compatible. It should be probably 22 square feet instead of 32 square feet or 30 square feet. And it should be 6 foot tall, rather then 7 foot tall or 8 foot tall or whatever particular number they happen to pick.

Q And is there any further explanation usually given?

A There's no criteria associated with it on how you could meet the objectives of compatibility. None.

Q And you've been applying for signs in the city of Lake Oswego for how many years?

A Since '94.

Q Since '94.

In the dialogue that occurs with the City after a permit is applied for, is it often that the City concedes to allowing the applicant to continue with a particular design –

A No.

Q – if there's a dispute over a color? Whose decision typically –

A It's the City's.

Q And, if the permit that you want is denied, what's – have you taken the next step to get – to appeal to the Design Review Committee?

A It's very much cost prohibitive to the customer. I think the last variance we applied for was like $1200.

[141] And you have a period of time to go by during a process. And most people – most customers don't want to go through that expense and/or hassle in applying for it. And, even then, when you ask the City about a variance process, they'll tell you right – state up front that it's not likely you're going to get it.

Q And then taking it to the next step of the City Council, have you taken that step?

A We did that with GK Travel. We took it to variance. We took it to the DRC. We took it to Council. All were denied.

Q What were the costs associated with filing for the Council? Do you recall?

A Not right offhand. I think the total for all the process was close to $2,000, 1800, somewhere in that range.

THE COURT: Was that for both – I'm sorry.

THE WITNESS: Yes.

THE COURT: Was that all the way –

THE WITNESS: I think it was the whole –

THE COURT: – up to City Council?

THE WITNESS: – the whole process.

THE COURT: Both?

Okay.

THE WITNESS: Yeah.

That's not counting all the staff time that went [142] in, all the design time, and application process and all that.

BY MR. BRAGG: (Continuing)

Q So, from the time you file the initial application to the time that staff approves or denies it, approximately how long does that take?

A Well, it can be real brief if you go along with their recommendations. It can be any number of weeks if you don't want to go along with their recommendation and file for a variance or appeal their decision.

Q And while you're waiting for the application to be decided, the client is without a sign?

A That's correct.

Q What's the average cost of putting up a new sign? In the city of Lake Oswego, to be specific.

A Generally, in the industry we track our average cost of a sale, which is any number of different kinds of signs, but it's around 6 to $8,000 average.

* * *

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APPENDIX J

Bill Krueger, co-owner of the Black Tartan, says he will have to replace the 15-foot sign that met right with a smaller version by spring 2004. Krueger says the 40-year-old sign is a community icon that shouldn't have to go.

The Oregonian,
"LAKE OSWEGO COUNCIL SAYS
ENFORCE SIGN CODE"
By Aimee Green,
Thursday, September 7, 2000; Edition: SUNRISE,
Section: LOCAL STORIES WEST ZONER NORTH SOUTH
SOUTHWEST, Page D03